STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 30, 2002
v	No. 228166 Macomb Circuit Court
CARLA MARIE MOCERI, Defendant-Appellant.	LC No. 97-001645-FC

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and first-degree child abuse, MCL 750.136b(2). She was sentenced to concurrent prison terms of 180 to 270 months for the CSC I conviction, and eight to fifteen years for the child abuse conviction. Defendant appeals by right. We affirm.

I

Defendant first argues that her convictions of both first-degree child abuse and CSC I violate her right to be free from double jeopardy because she was subjected to multiple punishments for a single offense. US Const, Am V; Const 1963, art 1, § 15. We disagree. Because defendant failed to raise a double jeopardy claim below, this Court reviews this unpreserved constitutional claim for plain error affecting defendant's substantial rights, i.e., that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The double jeopardy provisions of the United States Constitution, US Const, Am V, and the Michigan Constitution, Const 1963, art 1, § 15, protect citizens from multiple punishments for the same offense. *People v Torres*, 452 Mich 43, 63-64; 549 NW2d 540 (1996); *People v Harding*, 443 Mich 693, 699 (Brickley, J.), 721 (Riley J., concurring in part and dissenting in part); 506 NW2d 482 (1993). The intent of the Legislature is the determining factor in evaluating a double jeopardy claim under both the federal and state constitutions. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997); *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984). This Court determines legislative intent with regard to the federal constitution by applying the "same-elements test" set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), which requires the reviewing court to determine "whether each provision requires proof of a fact which the other does not." *Denio, supra* at 707.

Under the state constitution, legislative intent is determined by "traditional means . . . such as the subject, language, and history of the statutes." *Id.* at 708. Relevant factors to consider in determining legislative intent include, but are not limited to, whether each statute prohibits conduct violative of distinct social norms, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, and the elements of each offense. *Id*.; *People v Fox (After Remand)*, 232 Mich App 541, 556; 591 NW2d 384 (1998).

The CSC I statute provides that a person is guilty of criminal sexual conduct in the first degree "if he or she engages in sexual penetration with another person" and certain aggravating circumstances exist. MCL 750.520b(1). The relevant circumstance in this case is the other person being under thirteen years of age. MCL 750.520b(1)(a). "Sexual penetration" is defined in MCL 750.520a(m) as

> sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

The child abuse statute provides that "[a] person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2). "Child" means a person who is less than eighteen years old and is not emancipated. MCL 750.136b(1)(a). "Person" refers to "a child's parent or guardian or any other person who cares for, has custody of, or has authority over a child . . . ." MCL 750.136b(1)(d). "Serious physical harm" is "any physical injury" that "seriously impairs the child's health or physical well-being . . . . " MCL 750.136b(1)(f). "Serious mental harm" refers to "an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 750.136b(1)(g).

We hold that defendant's dual convictions and punishments for first-degree child abuse and CSC I do not violate either the federal or state protections against double jeopardy. A comparison of the elements of these two offenses reveals that each requires proof of a fact that the other does not. *Blockburger*, *supra*. The CSC I statute requires "sexual penetration," regardless of any injury. MCL 750.520b(1). By contrast, the first-degree child abuse statute does not require sexual penetration, but requires a physical or mental injury, a victim under eighteen years of age, and a perpetrator with supervisory authority over the child. MCL 750.136b(1), (2).

In addition, each statute prohibits conduct that is violative of distinct social norms. The CSC I statute is designed to protect all persons, regardless of age, against nonconsensual sexual penetrations. *People v Ward*, 206 Mich App 38, 42; 520 NW2d 363 (1994). In contrast, the societal interest served in making all degrees of child abuse a crime is to protect children from the abuses and excesses of adults to whose authority the children have been subordinated, and to protect children from assaultive behavior. See *People v Flowers*, 222 Mich App 732, 735; 565 NW2d 12 (1997). Also, the amount of punishment expressly authorized by the Legislature for each crime is different. CSC I is punishable by imprisonment for life or any term of years, MCL 750.520b(2), whereas first-degree child abuse is punishable by imprisonment for not more than fifteen years, MCL 750.136b(2).

Because the crimes have disparate elements, each punishes conduct violative of distinct social norms, and each has differing penalties, it is apparent that the Legislature intended that the crimes of first-degree child abuse and CSC I be punished separately. Accordingly, defendant's convictions do not violate the double jeopardy protection against multiple punishments. Therefore, defendant has failed to demonstrate plain error.

II

Defendant argues that the evidence was insufficient to support her conviction of CSC I because there was no evidence of any sexual conduct, sexual purpose, or sexual gratification. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

In this case, viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented from which a jury could infer the elements of the charged offenses. Contrary to defendant's argument, proof that the penetration was committed for a sexual purpose, arousal, or gratification is not an element of CSC I. See *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997); *People v Anderson*, 111 Mich App 671, 677-678; 314 NW2d 723 (1981); *People v Garrow*, 99 Mich App 834, 837-838; 298 NW2d 627 (1980). Rather, as it relates to this case, a person is guilty of CSC I if she engages in sexual penetration with a person under thirteen years of age. MCL 750.520b(1)(a); *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995). At trial, there was evidence that the eight-month-old victim's vagina was penetrated, directly and forcefully, with a small object, which caused a large laceration and instant bleeding. There was also evidence that, at the time of the injury, defendant was the only person in the house who could have caused the injury. A pediatric expert described the child's injury as one that is seen in sexually abused older girls. This evidence, viewed in a light most favorable to the prosecution, was sufficient for a rational trier of fact to conclude that the elements of CSC I were proven beyond a reasonable doubt. Accordingly, this issue does not warrant reversal.

III

Defendant argues that the trial court erred by refusing to give an adverse inference instruction to the jury regarding the police's destruction of a toy chipmunk, which defendant claims the eight-month-old victim used to self-inflict the injury. We disagree. We review a trial court's determination of whether a jury instruction is accurate and applicable in view of all the factors present in a particular case for an abuse of discretion. *People v Perry*, 218 Mich App 520, 526 (Batzer, J.), 545 (O'Connell, J. concurring); 554 NW2d 362 (1996), aff'd 460 Mich 55; 594 NW2d 477 (1999). An abuse of discretion is found only if an unprejudiced person,

considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

We find no basis for reversal. Michigan has long recognized that when material evidence in control of a party is not produced at trial, the opposing party is entitled to an adverse inference instruction. See, e.g., *Barringer v Arnold*, 358 Mich 594, 601, 604-605; 101 NW2d 365 (1960); *People v Hardaway*, 67 Mich App 82; 240 NW2d 276 (1976). However, absent the intentional destruction of exculpatory evidence, or a showing of police or prosecutorial bad faith, a loss of evidence that occurs before a defense request for its production does not require reversal. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992); *People v Albert*, 89 Mich App 350, 352-353; 280 NW2d 523 (1979). Indeed, in *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993), this Court held that the trial court did not err in declining to give an adverse inference instruction where the defendant failed to demonstrate bad faith in the failure to produce evidence.

Here, defendant has failed to demonstrate bad faith or that the evidence was exculpatory. This case began in 1996, but was not tried until 2000. On July 14, 1999, the lead police detective ordered the toy destroyed, apparently believing the case had been resolved. Defendant pleaded no contest in late July 1999, but later withdrew her plea in September 1999. At trial, a pediatric expert, who operated on the victim following the incident, testified that the chipmunk toy was "*absolutely not*" the cause of the injury. Because defendant has not demonstrated prejudice, or that the police or prosecution acted in bad faith, the trial court did not abuse its discretion in declining to give the requested adverse inference instruction. *Davis, supra*. Accordingly, this issue does not provide a basis for reversal.

IV

Defendant argues that the trial court abused its discretion by ruling that the prosecutor could cross-examine defendant's proposed character witnesses regarding defendant's acts of assault and domestic violence, where such acts would be beyond the scope of direct examination. As a result of the court's ruling, defendant did not present her proposed character witnesses.

This Court reviews a trial court's decision concerning the admission of evidence or the scope of cross-examination for an abuse of discretion. *Ullah, supra*; *People v Williams*, 191 Mich App 269, 275; 477 NW2d 877 (1991). We find no abuse of discretion here. Defendant's reliance on MRE 404(b) is misplaced. MRE 404(a)(1) allows a criminal defendant to introduce evidence of her character to prove that she could not have committed the crime charged. *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986). Where such evidence is admitted, MRE 405(a) allows cross-examination to rebut the assertion by asking the witness about relevant specific instances of misconduct. *People v Lukity*, 460 Mich 484, 498; 596 NW2d 607 (1999). In addition, the prosecutor may question witnesses about a defendant's bad acts to "test [their] knowledge and candor" about the defendant's character. See *People v Champion*, 411 Mich 468, 471; 307 NW2d 681 (1981).

V

Defendant argues that the trial court abused its discretion when it denied her motion for a mistrial after the victim's mother "stormed from the stand and refused [to] answer questions

regarding a civil suit against the defendant." This Court reviews a trial court's decision regarding a motion for mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs [her] ability to get a fair trial." *Id.* Generally, "an unresponsive, volunteered answer to a proper question is not cause for granting a mistrial." *People v Gonzales*, 193 Mich App 263, 266-267; 483 NW2d 458 (1992).

We initially note that defendant not only fails to provide citations to the record in support of both asserted facts and alleged error, but she also fails to cite any legal authority in support of her position. MCR 7.212(C)(7). Defendant's failure may be deemed an abandonment of this issue. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Regardless, this issue does not provide a basis for reversal.

During defense counsel's cross-examination of the victim's mother, the following exchange occurred:

> *Q*. All right. Is it correct that you and your husband on your own behalf as well as of your daughter sued [defendant] claiming that she intentionally assaulted [the victim]?
>
> *A*. Yes, sir.
>
> *Q*. Okay. Is it true that you and your husband on your own behalf as well as on behalf of your daughter sued [defendant's son] suggesting that he assaulted [the victim] and that [defendant] did not properly supervise [him]?
>
> *A*. That was not from us.
>
> *Q*. Okay.
>
> *A*. That was something Mr. Tyler did. All I asked him was to go ahead and file [a] civil suit because a criminal suit wasn't getting anywhere and in order for her not to baby-sit any more people—any more kids, she needs to have a record somewhere. Okay. Because there is too many nitpicking kids get [sic] hurt. My daughter has a four-and-a-half-year-old friend that was just assaulted by a 17-year-old kid the other day, okay; it's happening everywhere now.
>
> *Q*. Okay.
>
> *A*. You don't even realize what—this is an eight-month-year-old (sic) kid.
>
> [Defense counsel]: Your Honor, I would ask that those comments be stricken.
>
> [Trial Court]: It is just a few more seconds. He hasn't got much longer.
>
> [The witness]: How can you do it to my baby? God bless you. I'm sorry, but I can't sit here and take this. This is not right.

[Trial court]: Why don't you just calm down.

[The witness]: This is not right.

[Trial court]: We'll send the jury out. Send the jury out.

[The witness]: She hurt my kid.

[Prosecutor]: Can we--

[Trial court]: We'll send the jury out.

Contrary to defendant's claim, the witness did not storm out of the courtroom and refuse to answer any further questions. Rather, the jury was sent out of the courtroom by the trial court, and, after a brief break, the jury returned and the witness continued to testify on cross-examination, redirect, and re-cross examination. Further, the outbursts from the victim's mother during her testimony were unresponsive, volunteered answers to properly asked questions. The trial court took the necessary steps to minimize the effect of the outbursts on the jury. The court instructed the jury to disregard the witness' outburst and her exhibition of emotion, and that none of what transpired was relevant to the case and, therefore, should not be considered in evaluating defendant's innocence or guilt. Because defendant has not shown prejudice warranting a mistrial, the trial court did not abuse its discretion by denying defendant's motion for a mistrial.

VI

We reject defendant's final argument that the cumulative effect of several errors deprived her of a fair trial. Because no cognizable errors were identified that deprived defendant of a fair trial, reversal under the cumulative error theory is unwarranted. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

We affirm.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Jane E. Markey